No. 18-1059

IN THE

Supreme Court of the United States

BRIDGET ANNE KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.,*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT WILLIAM E. BARONI, JR.

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September 17, 2019

QUESTION PRESENTED

Does a public official "defraud" the government of its property by advancing a "public policy reason" for an official decision that is not his or her subjective "real reason" for making the decision?

PARTIES TO THE PROCEEDING

Petitioner Bridget Anne Kelly and Respondent William E. Baroni, Jr. are the parties supporting reversal. The United States is the respondent in support of the decision below.

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INTRODUCTION

Just three years ago, this Court reminded prosecutors and courts that they may not stretch federal criminal "'statute[s] in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials.'" *McDonnell* v. *United States*, 136 S. Ct. 2355, 2373 (2016) (quoting *McNally* v. *United States*, 483 U.S. 350, 360 (1987)). But the government in this case did just that when it took two federal property fraud statutes and contorted them in previously unknown ways in a contrived effort to supply a federal prosecutorial response to public outrage over an unseemly episode of state-level political gamesmanship. Consistent with its prior decisions, this Court should correct that overreach.

* * * *

This case arises out of what has come to be known as "Bridgegate," a political scandal that erupted when defendants Bill Baroni, the Deputy Executive Director of the Port Authority of New York and New Jersey, and Bridget Kelly, a deputy chief of staff to New Jersey Governor Chris Christie, changed the traffic pattern leading onto the George Washington Bridge.

The George Washington Bridge connects Fort Lee, New Jersey and New York City. Pet. App. 4a. Historically, each weekday morning, three of the twelve approach lanes to the bridge's upper-deck on the New Jersey side were carved off with traffic cones to provide exclusive, special access to drivers approaching from the local streets of Fort Lee. *Id.* The remaining nine lanes were shared by the mass of traffic approaching from various feeder highways dubbed the "Main Line." *Id.*

In September 2013, the defendants ordered the traffic cones to be placed two lanes further to the right, thereby eliminating two of Fort Lee's three special access lanes and opening them to Main Line drivers. Pet. App. 7a-9a. The resulting bottleneck at the single special access lane caused traffic to back up into Fort Lee, creating severe traffic during the morning rush hour until the Port Authority reinstated the original traffic pattern at the end of the week. *Id*. at 9a-10a.

The media soon reported (and a jury would later agree) that although Baroni and others claimed to have reallocated the two special access lanes in order to carry out a traffic study, their actual purpose was to punish Fort Lee's Democratic mayor for refusing to endorse Governor Christie, a Republican, in his bid for re-election. Pet. App. 2a. A political scandal ensued. Baroni, Kelly, and Baroni's de facto chief of staff, David Wildstein, were each either fired or forced to resign. *Id*. at 11a. Governor Christie, whom voters apparently blamed, found his eventual presidential campaign irretrievably tarnished, Michael Symons, *What Went Wrong for Christie's Presidential Campaign?*, USA Today (Feb. 10, 2016), and finished out his term as governor with the lowest recorded approval rating for any New Jersey governor, Nina Agrawal, *As Gov. Chris Christie Bids Farewell, Many in New Jersey Say Good Riddance*, Los Angeles Times (Jan. 9, 2018).

The U.S. Attorney for the District of New Jersey, however, was unsatisfied with that political resolution. Applying indisputably novel theories, the government charged Baroni and Kelly (and Wildstein as a cooperating defendant) with, as relevant here, wire fraud and federal program fraud. Pet. App. 11a-13a. The government argued that Baroni and Kelly had deprived the Port Authority of money and property—at

most, approximately $14,314—by causing Port Authority employees (including Baroni himself) to expend time and labor on the realignment. This was fraud, according to the government, because Baroni and Kelly's stated reason for the realignment (to study the effect on traffic) was not their real reason (to punish Fort Lee's mayor politically). *Id.* at 14a-15a, 35a.[1]

Baroni and Kelly argued that the charged conduct was not fraud, contending that public officials routinely allocate or reallocate public resources based on undisclosed political interests, and that doing so does not fraudulently or otherwise illegally deprive a public agency of money or property. *E.g.*, Pet. App. 29a-30a, 35a-36a. The district court disagreed and allowed the charges to go to a jury, which convicted.

On appeal, the Third Circuit affirmed the fraud convictions, accepting the government's theory that Baroni and Kelly committed fraud when they realigned the lanes for a concealed political purpose while espousing a different justification. Pet. App. 13a-66a.

That theory is wrong. In the context of honest services fraud, this Court has made clear for decades that the federal fraud statutes do not give federal prosecutors broad license to "set[] standards of … good government for local and state officials." *Skilling* v. *United States*, 561 U.S. 358, 402 (2010) (quoting *McNally*, 483 U.S. at 360). More specifically, this Court has *expressly*

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[1] The government also charged Baroni and Kelly with depriving stalled motorists of their supposed right to intrastate travel. Pet. App. 66a-67a. The district court rejected the defendants' argument that these charges failed because there was no clearly established right to intrastate travel, *id.*, but the Third Circuit agreed with the defendants that the government had overreached on this theory, and reversed their convictions on those counts, *id.* at 73a. Those counts are not before the Court.

held that mere "undisclosed self-dealing by a public official"—*i.e.*, the taking of official action to further an undisclosed personal interest while purporting to act in the interests of the public (without a bribe or kickback)—is *not* honest services fraud. *Id.* at 409-10. Unquestionably, that reasoning includes concealed political interests. Indeed, in a companion case to *Skilling*, the government affirmatively conceded that "[h]onest-services fraud does not embrace allegations that purely political interests may have influenced a public official's performance of his duty." Br. for the United States at 45, *Weyhrauch* v. *United States*, 561 U.S. 476 (2010) (No. 08-1196), 2009 WL 3495337 at *45 ("Weyhrauch Br.").

The convictions here do more than just run headlong into the reasoning of *Skilling* and *McNally*. As a practical matter, if the government's theory is right, *Skilling* and *McNally* are a dead letter. Every decision by every public official can be shown to have required some amount of resources either to make the decision or to effectuate it; often more, no doubt, than the relatively paltry $14,314 at issue here. If the government can convict a public official of fraudulently depriving his agency of money or property simply for employing his agency's resources with a concealed political motive while espousing some other justification—in other words, not for being a venal or corrupt politician, but just for being political at all—then every public official who went uncharged based on the limitations imposed by *McNally* and *Skilling* should count their blessings that the government did not discover this path around those limitations sooner. More importantly, if that is correct, every current or future public official serves with the Sword of Damocles dangling overhead, because the federal government will now have free rein

to charge and convict officials for all manner of political deals, favors, and rebukes, unless those officials are brutally candid about their true political motivations. If the government prevails, "the room where it happens" will become a crime scene.[2]

Given the hyper-partisan tone of our Nation's current political discourse, where prominent voices on both sides now regularly call for the prosecution of political adversaries, that threat is not one this Court should abide. In any event, it is not one the present state of the law allows. Whatever one may think of the dubious wisdom of laws that would allow the prosecution of a public official who, for no personal benefit, directs agency action for a proffered reason that is actually pretext for a political reason—hardly a circumstance unknown to this Court, see, *e.g.*, *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551 (2019)—those are not the laws we have; a fact made clear in the honest services fraud cases, and that remains clear no matter what other statutory rocks the government looks under.

The ordinary money-and-property fraud statutes used here do not by their terms cover such conduct, have never before been used to prosecute such conduct, and core principles of vagueness, lenity, and federalism make clear that they may not be expanded by courts or prosecutors to criminalize such conduct. If Congress wants to grant federal prosecutors license to target public officials based on the countless run-of-the-mill acts and decisions that are motivated by some reason other than the publicly-disclosed reason—as a

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[2] Lin-Manuel Miranda, *The Room Where It Happens*, *on* Hamilton (Atl. Recording Co. 2015) (concerning secret, backroom deal between Alexander Hamilton, Thomas Jefferson, and James Madison).

practical matter, a license to shoot fish in a well-stocked barrel—it will need to pass a law that says so, because the two statutes employed here do not.

OPINIONS BELOW

The district court's opinion refusing to dismiss the indictment, Pet. App. 75a, is at 2016 WL 3388302. Its opinion denying post-trial relief, Pet. App. 105a, is at 2017 WL 787122. The Third Circuit's decision affirming in part, reversing in part, and remanding, Pet. App. 1a, is reported at 909 F.3d 550.

JURISDICTION

The Third Circuit issued its opinion and entered judgment on November 27, 2018; it denied Kelly rehearing on February 5, 2019. Pet. App. 1a, 129a. This Court granted certiorari on June 28, 2019. Jurisdiction lies under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant statutory provisions (18 U.S.C. §§ 666 and 1343) are at Pet. App. 131a, 133a.

STATEMENT OF THE CASE

A. Governor Christie's 2013 Gubernatorial Re-Election Campaign

Bridgegate is a case of bareknuckle New Jersey politics, not graft.

In the 2013 gubernatorial election in New Jersey, incumbent Governor Chris Christie had his sights set not just on re-election, but on an overwhelming and bipartisan victory that he could use as a springboard to launch a successful campaign for President of the United States in 2016. Pet. App. 4a. In order to obtain

such a victory, Governor Christie—a Republican—coveted the support of local Democratic elected officials throughout the state. The Governor's Office of Intergovernmental Affairs ("IGA")—the liaison between the Governor's office and local elected officials throughout New Jersey—was enlisted to help solicit such support. *Id.* at 3a-4a. Kelly oversaw IGA in her capacity as one of Governor Christie's Deputy Chiefs of Staff. *Id.* at 4a.

In time-honored political fashion, IGA used all of the levers and trappings of state government to court potential endorsers. Among other things, IGA favored select local officials with tickets to the Governor's box at sporting events, meetings with state officials, breakfast meetings with the Governor at the Governor's mansion, and invitations to the Governor's annual holiday party. Pet. App. 4a-5a.

Another valuable source of political favors to fuel Governor Christie's re-election effort was the Port Authority of New York and New Jersey. The Port Authority is a bi-state agency established by the states of New York and New Jersey to build and operate critical infrastructure throughout the region, including some of the country's busiest airports, marine terminals, trains, buses, tunnels, and bridges. See *Overview of Facilities and Services*, Port Auth. of N.Y. & N.J., https://www.panynj.gov/about/facilities-services.html. The Port Authority is run by officials who are appointed by the governors of the two states, with the Governor of New York appointing the Executive Director and the Governor of New Jersey appointing the Deputy Executive Director. J.A. 137-43. In practice, these two Port Authority officials were regarded as equivalent co-heads representing their respective state's interests in the partnership. *Id.* at 519 ("One did not report to the other. They were both considered

to be at the same level[.]"); *id.* at 236 (the two appointees had "a 50/50 partnership, not with any one state having more authority than the other"). Baroni served as Governor Christie's appointee as Deputy Executive Director. *Id.* at 141.

Governor Christie and his staff saw political opportunity in the ability to use the Port Authority's far-reaching operations to provide favors to political allies and potential endorsers in connection with the 2013 gubernatorial campaign. Indeed, the IGA and Governor Christie's campaign regularly called upon Baroni—frequently through Wildstein, a fiercely loyal Christie partisan who had been installed to act, in effect, as Baroni's chief of staff, Pet. App. 3a—to bestow such favors on various elected officials in order to encourage political support for Governor Christie. *Id.* at 5a. These favors ranged from the very small (providing steel from the original World Trade Center towers, flags that had flown over Ground Zero, and tours of Ground Zero) to the very large (having the Port Authority purchase the Military Ocean Terminal at Bayonne for $250 million knowing it could benefit that town's mayor politically). *Id.*

But just as the Governor's Office was eager to open the spigot of publicly financed favors to potential supporters, it showed little hesitation in turning a cold shoulder to those who refused to endorse Governor Christie. This was true, for example, with respect to Jersey City Mayor Steven Fulop. In May 2013, Fulop was the newly elected Democratic mayor of Jersey City. J.A. 326. As one aspect of courting Fulop's endorsement, IGA scheduled a "Mayor's Day" for Fulop: a daylong series of meetings intended to introduce him to, and make him feel supported by, various key state agencies including the Port Authority. *Id.* at 333-34. But before those scheduled meetings happened, Fulop

made clear that he would not be endorsing Governor Christie. *Id.* at 334-36. In response, the Governor's office ordered the cancellation of Fulop's "Mayor's Day," and—to ensure that Fulop received the clear "political … message" that "he was not going to get any assistance out of the State of New Jersey while he was Mayor"—Baroni and the other state agency representatives were told to separately and independently communicate their cancellations to Fulop, and to "ice" Fulop by ignoring any subsequent inquiries. *Id.* at 334-42. In the district court, the government claimed this episode bore a "striking" "degree of factual similarity" to the charged conduct, and yet affirmatively asserted (in successfully obtaining admission pursuant to Fed. R. Evid. 404(b)) that this episode "was not criminal." *Id.* at 62-65.

B. Mayor Sokolich & Fort Lee, New Jersey

Another target of IGA's endorsement efforts was Mark Sokolich, the Democratic mayor of Fort Lee. IGA courted Sokolich in the usual ways, inviting him to watch a New York Giants game from the Governor's box, extending an invitation to attend several holiday parties at the Governor's mansion, and providing him with VIP seats to the Governor's budget address. Pet. App. 5a.

The Port Authority was particularly well positioned to bestow favors on Sokolich because Sokolich's town was one of the Port Authority's host communities. One of the Port Authority's responsibilities is managing the George Washington Bridge, a double-decked suspension bridge connecting New Jersey on one side to New York City on the other. Pet. App. 4a. The New Jersey side of the bridge lies in Fort Lee.

Even prior to the 2013 election cycle, the Port Authority was already providing a substantial bridge-related benefit to Mayor Sokolich and his constituents on a daily basis. Twelve tollbooth lanes feed onto the bridge's upper level from the Fort Lee side. Pet. App. 4a. Every weekday, Port Authority police officers set up traffic cones during the morning rush-hour to segregate three of those lanes for the exclusive use of traffic approaching from Fort Lee's local streets. *Id*. The remaining nine lanes were accessible to drivers approaching from the "Main Line," which is fed by an array of different state and interstate highways. *Id*. This decision to give Fort Lee special use of three lanes onto the bridge each weekday morning dated back to a decades-old political deal between the then-Governor of New Jersey and the then-Mayor of Fort Lee. *Id.*

Beyond perpetuating the special access lanes, the Port Authority found other ways to favor Mayor Sokolich and his town in order to encourage Mayor Sokolich's endorsement of Governor Christie in the coming election. Pet. App. 5a. Besides token gifts of Ground Zero tours and commemorative items that were provided to Mayor Sokolich personally, the Port Authority provided Fort Lee with Port Authority police assistance to direct traffic in Fort Lee, contributed $5,000 to the Fort Lee fire department for the purchase of equipment, and spent more than $300,000 to fund four shuttle buses to transport Fort Lee residents between ferry and bus terminals. *Id.* at 5a-6a. Although no public official would ever say so publicly, Governor Christie's Deputy Chief of Staff remarked internally on the political motivation for approving the substantial shuttle bus expenditure, saying that it was

"a lot of dough," C.A. App. 1592,[3] and that he "hope[d] [Sokolich] remember[ed]" the Christie administration's largesse in the future, *id.* at 1406. But Mayor Sokolich did not. In March 2013, Mayor Sokolich informed IGA that it was politically untenable for him as a Democrat to endorse a Republican governor for reelection. Pet. App. 6a.

C. The Lane Realignment

After Sokolich told IGA that he would not endorse Governor Christie, Wildstein proposed a plan to "put some pressure on Mayor Sokolich" and "send him a message." Pet. App. 6a. Specifically, Wildstein suggested to Kelly that Fort Lee's special access lanes could be taken away. *Id.* at 4a, 6a. Wildstein recognized that if the special access lanes were not set aside each morning for drivers approaching the bridge from Fort Lee's local streets, bridge traffic would back up into the town. *Id.* Wildstein pitched the plan to Kelly, who approved, ultimately reaching agreement with Wildstein that two of the three lanes would be transferred back to "Main Line" use, leaving only one lane dedicated to traffic from Fort Lee's local streets. *Id.* at 6a-9a. As with Mayor Fulop, Kelly intended the realignment to "punish" Mayor Sokolich and show him that, after his refusal to endorse Governor Christie, "life would be more difficult for him in the second Christie term than it had been [i]n the first." *Id.* at 6a (alteration in original). Wildstein testified at trial that Baroni was informed about and approved the plan as well. *Id.* at 6a-7a.

Wildstein prepared the lane realignment to go into effect on Monday, September 9, 2013, without advance warning to Fort Lee public officials or drivers. Pet.

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[3] "C.A. App." refers to the Joint Appendix filed in the Court of Appeals.

App. 8a-9a. In conveying Baroni's command for the realignment to several of Baroni's subordinates, Wildstein did not reveal that it was politically motivated. Instead, he said that it was being done to test and study the impact on traffic approaching the bridge to determine whether the lanes should be permanently realigned. *Id.* at 7a-9a, 23a.

The lane realignment went into effect as planned on September 9, 2013. Pet. App. 9a. Contrary to misleading public reporting, none of the twelve tollbooth lanes were "closed."[4] All twelve lanes remained open, but in a new configuration—eleven lanes for the predominant flow of traffic approaching from the Main Line and one lane for Fort Lee traffic.

The new traffic pattern caused severe traffic in Fort Lee as cars attempting to enter the bridge from Fort Lee's local streets bottlenecked at the single toll lane and backed up into the town. Pet. App. 9a. By contrast, the mass of drivers entering the bridge from the Main Line, who now had two additional lanes to use, experienced less traffic entering and clearing the bridge than they had in the past. J.A. 367, 977.

The lane realignment persisted for a week. During that time, Mayor Sokolich attempted on several occasions to contact Baroni and IGA to have the old traffic pattern reinstated. Pet. App. 9a-10a. Pursuant to a prearranged plan, Baroni deliberately did not respond to Mayor Sokolich's messages. *Id.*

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[4] *See, e.g.*, Ted Sherman & Matt Arco, *Kelly Testifies Christie Signed Off on Bridgegate Lane Closures*, NJ.com (Oct. 21, 2016); Aliyah Frumin, *Ex-Christie Aide: I Told Gov. About 'Bridgegate' Lane Closures*, NBCNews.com (Oct. 21, 2016).

Near the end of the week, Port Authority Executive Director Patrick Foye became aware of the realignment and confronted Baroni about the impact on Fort Lee. Pet. App. 10a. Baroni asked Foye to continue the realignment, telling Foye that it was important politically to Governor Christie's office. *Id.* Foye refused and, on Friday, September 13, ordered the restoration of the old traffic pattern. *Id.*

At trial, the government presented evidence regarding the Port Authority "property" that was deployed in furtherance of the lane reallocation and the resulting cost to the Port Authority. One principal category was $3,696.09 spent to have backup toll collectors available to relieve the toll collector manning the single Fort Lee lane so that traffic would not stop if that collector needed a break. Pet. App. 47a. Any decision to reduce Fort Lee's allocation of lanes from three to one necessarily carried this cost, irrespective of the reason for the reallocation. Indeed, the very point of the expenditure was to alleviate the impact of the lane realignment on Fort Lee by ensuring that the flow of traffic through Fort Lee's one special access lane never had to stop.

The government also showed that Port Authority staff, in fact, collected traffic data while the new traffic pattern was in place and studied it to observe how it compared to historical travel-time data. Pet. App. 48a-49a. As noted, the collected data showed, among other things, that the realignment reduced the amount of time spent in traffic by Main Line drivers. J.A. 367, 977. The government asserted that this traffic study, however, was a charade. Pet. App. 48a-49a. Using payroll records, the government estimated that the value of the time spent conducting the traffic study was $1,828.80. *Id.*

The government also introduced an estimate of the number of hours that Wildstein and Baroni purportedly spent on the lane realignment, concluding that by spending those hours on the lane realignment they had supposedly cost the Port Authority $4,294.80 (if one indulged the fiction that they were timekeeping, non-salaried employees who worked some preestablished number of hours per week and then stopped, all of which was indisputably untrue). Pet. App. 49a. In addition, the change in traffic patterns interrupted an ongoing, unrelated traffic study that Baroni and Kelly concededly were unaware of at the time, but which needed to be redone at an additional cost that the government calculated to be approximately $4,400. *Id.* at 15a; J.A. 1004.

D. Public Outrage and the Resulting Criminal Charges Against Baroni and Kelly

The severe traffic in Fort Lee was the subject of intense media interest, with angry motorists demanding to know why the lane allocation had been changed without public notice. See, *e.g.*, Ted Mann & Heather Haddon, *Bridge Jam's Cause a Mystery*, Wall St. J. (Sept. 17, 2013). Eventually, the media began to report that the lane realignment was engineered as political payback against Mayor Sokolich. See, *e.g.*, Ted Mann, *Port Officials Say Little About September's George Washington Bridge Lane Closures*, Wall St. J. (Nov. 13, 2013); Emma Fitzsimmons, *Christie Ally Resigning From Port Authority*, N.Y. Times (Dec. 7, 2013); Kate Zernike, *Christie Faces Scandal on Traffic Jam Aides Ordered*, N.Y. Times (Jan. 8, 2014); N.R. Kleinfield, *A Bridge to Scandal: Behind the Fort Lee Ruse*, N.Y. Times (Jan. 12, 2014).

The political fallout from "Bridgegate"—as the scandal came to be known—was swift. Governor Christie fired or forced the resignation of Wildstein, Baroni,

and Kelly between December 2013 and January 2014. Pet. App. 11a. For his part, Governor Christie's standing in state and national politics declined dramatically. His presidential campaign was perpetually dogged by his perceived role in Bridgegate. See, *e.g.*, Brian Murphy, *Why Bridgegate Still Haunts Chris Christie*, Vanity Fair (Dec. 18, 2015). Ultimately, he left the governorship in January 2018 with the lowest recorded approval rating for any New Jersey governor. Agrawal, *supra*.

Reacting to the media attention and public outrage, the U.S. Attorney's Office for the District of New Jersey opened an investigation. Eventually, in April 2015, the government indicted Baroni and Kelly for: (1) conspiring to commit and committing wire fraud in violation of 18 U.S.C. §§ 1349 and 1343; (2) conspiring to commit and committing federal program fraud in violation of 18 U.S.C. §§ 371 and 666; and (3) conspiring to deprive and depriving an individual of a constitutional right in violation of 18 U.S.C. §§ 241 and 242. Pet. App. 2a-3a.

The wire fraud counts alleged that Baroni and Kelly obtained the Port Authority's money or property and deprived the Port Authority of its right to control its own assets by making false statements about the reasons for the lane realignment. Pet. App. 12a. The federal program fraud counts similarly alleged that Baroni and Kelly misused Port Authority property to "facilitate and conceal the causing of traffic problems in Fort Lee as punishment of Mayor Sokolich." *Id.* The civil rights counts alleged that Baroni and Kelly had interfered with the substantive due process right of drivers to intrastate "travel on public roadways free from restrictions unrelated to legitimate government objectives." *Id.* at 67a.

Baroni and Kelly moved to dismiss the charges ahead of trial, arguing that the alleged conduct—while perhaps not indicative of good government—was not criminal under any of the charged statutes. Pet. App. 13a. The District Court denied the pretrial motions to dismiss and, following a six-week jury trial, Baroni and Kelly were convicted on all counts. *Id.* Baroni and Kelly filed post-trial motions seeking judgments of acquittal or a new trial that were denied. *Id.* The district court sentenced Baroni to 24 months' imprisonment but permitted him to remain free on bail pending appeal. *Id.*

E. The Third Circuit's Decision

The Third Circuit affirmed in part, reversed in part, and remanded for resentencing. Pet. App. 73a-74a.

The Third Circuit affirmed the wire fraud and federal program fraud convictions. It concluded that the *fraud* consisted of lies Wildstein had told Baroni's Port Authority subordinates that the lane realignment was for the purpose of studying its effects on traffic when the true motivation was political. Pet. App. 15a, 17a-18a. It concluded that the Port Authority *money or property* at issue was principally the value of the time spent by Baroni, Wildstein, and other Port Authority employees preparing for, implementing, and monitoring the effects of the lane realignment. *Id.* at 16a, 22a-25a. In the alternative, although it noted that it was unnecessary to reach the issue, the court of appeals said that the Port Authority's right to control its money or property could supply the necessary property interest. *Id.* at 26a-28a. Finally, it concluded that Baroni and Kelly had not simply allocated the Port Authority's resources, but had affirmatively *deprived* the Port Authority of those resources and had obtained them because Baroni and Kelly had "commandeer[ed]

public employee time in a manner that made no economic or practical sense" and for which there was "no facially legitimate justification." *Id.* at 28a, 36a.

With respect to the argument that the charges were indistinguishable from the honest services fraud prosecutions that this Court had prohibited in *McNally* and *Skilling*, the Third Circuit relied on the fact that the government had not charged honest services fraud. The dispositive answer, according to the court of appeals, was that Baroni and Kelly "were charged with defrauding the Port Authority of its money and property—not the intangible right to their honest services." Pet. App. 31a.

As to the civil rights counts, the Third Circuit reversed the convictions. Pet. App. 73a. Observing that the government relied on only a single Third Circuit decision for the proposition that a right to intrastate travel existed, the court concluded that such a right was not clearly established as required by either Supreme Court precedent or a robust consensus of federal courts of appeal. *Id.* at 69a-72a. Based on the reversal of these counts, the court of appeals ordered the case to be remanded for resentencing.

F. Baroni's Decision to Proceed as a Respondent Rather than a Petitioner

Following the Third Circuit's decision, Kelly filed a petition for rehearing and rehearing *en banc*. J.A. 6. For his own part, however, Baroni asked the court of appeals to immediately issue its mandate so that he could be resentenced and begin serving his sentence while he decided whether to seek further review in this Court. See Letter to Clerk of the Court, *United States* v. *Baroni*, No. 17-1817 (3d Cir. Jan. 4. 2019). The Third

Circuit granted Baroni's request and issued the mandate on January 11, 2019, returning the case to the district court. J.A. 12.

On February 5, 2019, while Baroni was preparing for resentencing, the Third Circuit denied Kelly's petition for rehearing, Pet. App. 129a-130a, commencing the 90-day period within which Kelly and Baroni could petition this Court for a writ of certiorari. Kelly filed a petition almost immediately thereafter—on February 12, 2019—in order to establish a briefing schedule that would permit the Court to rule on the petition in June, before the Court's summer recess.

On February 26, 2019, the District Court resentenced Baroni to 18 months' imprisonment. See Amended Judgment, *United States* v. *Baroni*, No. 2:15-cr-00193-SDW-1 (D.N.J. Feb. 27, 2019), ECF No. 383. Beyond obtaining a reasonable surrender date, Baroni did not ask the district court for bail, choosing to begin serving his sentence.

Following his resentencing, Baroni was still within his time to file a petition for a writ of certiorari, and expected to do so. By that point, however, filing such a petition would have been virtually certain to delay the briefing schedule and resolution of Kelly's similar petition, pushing resolution of the two petitions from June to October—with Baroni remaining in prison the entire time.[5] Moreover, Baroni could not by that point adopt Kelly's briefing schedule by joining her petition because Rule 12.4 of the Rules of the Supreme Court states that a party may not join another party's petition after that petition has already been filed. Sup. Ct. R. 12.4.

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[5] This calculation proved to be correct. Even on the schedule established by Kelly's much earlier filing, the petition was, in fact, granted on June 28, 2019, the last week of the term.

Accordingly, to avoid delaying the Court's decision on Kelly's pending petition, Baroni determined not to file a petition, but, instead, to seek review of the Third Circuit's decision by filing as a respondent, as expressly provided by the Court's rules. Specifically, Supreme Court Rule 12.6 provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties" to a case in which the Court grants certiorari and are "considered respondents" with the right to participate in the case and to receive any relief from the Court's decision in the case, so long as they "ensure that counsel of record for all parties receive notice" of their intention. Sup. Ct. R. 12.6; see also *Black* v. *United States*, 561 U.S. 465, 468 n.1 (2010) (finding that a defendant who did not himself file a petition for a writ of certiorari was still "a respondent in support of petitioners who qualifies for relief under this Court's Rule 12.6"). Baroni provided the requisite notice and, on March 15, 2019, filed a brief—essentially indistinguishable from the petition he otherwise would have filed—in support of Kelly's petition.

Following the grant of certiorari in this case, Baroni immediately obtained an order from the district court granting him bail. See Order Setting Conditions of Release, *United States* v. *Baroni*, No. 2:15-cr-00193-SDW-1 (D.N.J. July 2, 2019), ECF No. 399.

ARGUMENT

Thirty years ago, this Court rejected the notion that the federal fraud statutes prohibit schemes to deprive the public of the intangible right to a public official's honest services, explaining that those statutes do not "set[] standards of disclosure and good government for local and state officials." *McNally,* 483 U.S. at 360.

Then, after Congress legislated to prohibit honest services fraud expressly, this Court strictly limited such prosecutions again, holding that an employee's official action "that furthers his own undisclosed … interests while purporting to act in the interests of those to whom he owes a fiduciary duty" is not fraud. *Skilling*, 561 U.S. at 409. The convictions here stem from the government's attempt to work around those decisions and prosecute the same conduct using the novel theory that a public official who offers an insincere justification for an official decision in order to conceal a political motive causes the deprivation of the public money or property expended in connection with that decision. Because every official decision requires the expenditure of at least *some* money or property, the government's theory would nullify *McNally* and *Skilling*, subjecting state and local officials to the same federal code of good government that this Court has disallowed. For that reason, the convictions should be reversed.

The use of the federal fraud statutes to prosecute the conduct here also contravenes a multitude of important constitutional principles. It provides no fair notice, lets unelected prosecutors and judges define the crime instead of Congress, violates the rule of lenity, undermines critical notions of federalism and the cannons of construction meant to enforce them, and places a pall of potential prosecution over everything that state and local officials do.

Finally, allowing the federal property fraud statutes to be used in this unprecedented way dangerously injects a potent new weapon into a highly charged, hyper-partisan political environment in which voices on both sides are already regularly clamoring for their rivals to be prosecuted. This Court has recently seen a number of allegations of undue political influence and pretextual decision-making, and its response has been

measured. But the convictions here, if upheld, will give license to prosecutors to dive in headlong and pursue those allegations, and others like them, as federal felonies. Absent a clearer statement by Congress, this Court should reject that result.

I. A PUBLIC OFFICIAL DOES NOT COMMIT "MONEY OR PROPERTY" FRAUD WHEN HE OR SHE ACTS TO FURTHER POLITICAL INTERESTS WHILE PURPORTING TO ACT IN THE BROADER PUBLIC INTEREST.

Baroni and Kelly have been convicted under the federal fraud statutes for doing *exactly* what this Court has said is not fraud: taking official action to further undisclosed interests while purporting to act in the interests of the public without pocketing a single cent for themselves. The government's approach in this case was to *nominally* charge "money or property" wire fraud and federal program fraud even though it *actually* charged the non-bribes-and-kickbacks honest services fraud that this Court has rightly said is not criminal. But if "good government" and undisclosed interest cases, like this one, are chargeable as "money or property" fraud, then this Court's carefully considered limitation on the reach of the honest services fraud theory has been eviscerated and everything this Court has said about the federal fraud statutes over the last 30 years can be thrown out. To avoid that dangerous state of affairs, this Court must reaffirm that mere undisclosed interest cases, like this one, are beyond the reach of the federal fraud statutes.

1. Starting in the 1940s, federal courts began interpreting the federal fraud statutes to prohibit schemes to deprive the public of the intangible right to a public official's honest services. *Skilling*, 561 U.S. at

400-01. This theory emerged primarily—but not exclusively—to prosecute bribes and kickbacks cases, in which, unlike in more conventional fraud cases, "the victim's loss of money or property [did not] suppl[y] the defendant's gain." *Id.* at 400. But in *McNally*, this Court "stopped the development of the intangible-rights doctrine in its tracks." *Id.* at 401. *McNally* held that the federal fraud statutes do not create a "right of the citizenry to good government" or a "right to have public officials perform their duties honestly" and emphatically do not "set[] standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 356, 358, 360. Instead, the Court held that the federal fraud statutes are "limited in scope to the protection of property rights." *Id.* at 360.

In response to *McNally*, Congress soon enacted 18 U.S.C. § 1346 "specifically to cover one of the intangible rights that lower courts had protected … prior to *McNally*: the intangible right of honest services." *Skilling*, 561 U.S. at 402. This vague new provision was soon "invoked to impose criminal penalties upon a staggeringly broad swath of behavior," including convictions of "a local housing official who failed to disclose a conflict of interest" and "city employees who engaged in political-patronage hiring for local civil-service jobs." *Sorich* v. *United States*, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting from denial of cert.).

Taken "to its logical conclusion," this version of honest services fraud—*i.e.*, "that officeholders and employees owe a duty to act only in the best interests of their constituents and employers"—criminalizes run-of-the-mill, even if unsavory, political activity, like "a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his re-election" or "a public employee's recommendation of his incompetent friend for a public contract." *Id.*

Indeed, without "some coherent limiting principle to define what 'the intangible right to honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Id.* at 1206.

For these reasons, a decade ago in *Skilling* and two companion cases, *Weyhrauch* v. *United States*, 561 U.S. 476 (2010) and *Black* v. *United States*, 561 U.S. 465 (2010), this Court took up the question of what the "honest services" provision prohibits. With the issue squarely before the Court and cognizant of the above-described concerns, the government conceded that the honest services statute does *not* criminalize acting with concealed political interests: "Honest-services fraud does not embrace allegations that purely political interests may have influenced a public official's performance of his duty." Weyhrauch Br. at 45. Consistent with that concession, in *Skilling* this Court explicitly refused to extend the honest services statute to reach the "amorphous category" of "conflict-of-interest cases"—*i.e.*, cases involving "a public official" who takes "official action … that furthers his own undisclosed … interests while purporting to act in the interests of those to whom he owes a fiduciary duty." 561 U.S. at 409-10. Instead, the Court pared honest services fraud back "down to its core," holding that it covers only schemes involving "bribes or kickbacks." *Id.* at 404.

2. Affirming Baroni and Kelly's convictions would effectively strike *McNally* and *Skilling* from the pages of the United States Reports, giving federal prosecutors free rein to prosecute *exactly* what those cases said is not criminal: a public official's acts that serve an undisclosed political purpose. Baroni and Kelly's decision

to reallocate two traffic lanes from one constituency to another for the concealed political purpose of punishing a political opponent would have been charged as intangible-rights fraud if Bridgegate had played out prior to *McNally*. But this Court slammed that door shut, explaining that the federal fraud statutes do not "set[] standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360. And if these facts had played out after the enactment of 18 U.S.C. § 1346 but before *Skilling*, the government would have charged honest services fraud. But this Court slammed that door shut too, holding that an honest services charge requires a bribe or a kickback. *Skilling*, 561 U.S. at 404.

Now, bent on fashioning a federal criminal charge out of this local political issue, the government has taken *McNally* and *Skilling* full circle: To avoid *Skilling*'s requirement of a bribe or a kickback for an honest services charge, the government here formally charged "money or property" wire fraud and "property" federal program fraud on the theory that some public employee labor was used to make or carry out an official decision that served hidden partisan political ends. Indeed, the government has hardly even attempted to conceal that it is seeking a backdoor way to charge what *McNally* and *Skilling* prohibit. To the contrary, for the peroration of its closing argument at trial, the government practically quoted from the theory of criminal liability rejected by this Court and abandoned by the Solicitor General in *Skilling* and its companion cases, telling the jury not that Baroni and Kelly had taken money or property from the Port Authority, but, rather, that: "Mr. Baroni and Ms. Kelly … had a higher responsibility. A higher responsibility to the public. … And that responsibility was to make

each and every decision in the best interest of the people of New Jersey[.]" J.A. 886.

That duty may exist, and violating it may carry repercussions at the ballot box or even, perhaps, in state criminal courts. But it does not derive from the federal fraud statutes, and enforcing it is not the mandate of federal prosecutors. *McNally* prohibits using the federal fraud statutes to "set[] standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360.

3. The government's answer to this concern, adopted by the court of appeals, was no answer at all. The court of appeals brushed *Skilling* and its progeny aside by pointing out that Baroni and Kelly "were charged with simple money and property fraud … not honest services fraud." Pet. App. 30a. That is right, of course, but the point is that on the theory advanced by the government here, *every* prohibited honest services fraud case could be similarly charged as simple money and property fraud. Even the court of appeals recognized that only a "peppercorn" of money or property would need to be expended making or carrying out the public official's decision in order to invoke the federal fraud statutes. *Id.* Any official decision involves at least that.[6]

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[6] Creative federal prosecutors will similarly have no problem satisfying Section 666's modest $5,000 threshold in every case. 18 U.S.C. § 666(a)(1)(A)(i). Here, the government purported to get most of the way there simply by pointing to the value of a contemporaneous Port Authority traffic study, unknown to Baroni and Kelly, that was tainted by the lane realignment. Pet. App. 15a. Plus the value of the time spent by employees involved in carrying out the official decision. *Id.* Plus the value of the time spent by officials in making and executing the decision. *Id.* Plus the value

Other circuits have not allowed *McNally* and *Skilling*'s principles to be so easily abrogated through clever pleading; *i.e.*, by "recharacteriz[ing] every breach of fiduciary duty as a financial harm, and thereby … let[ting] in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States* v. *Ochs*, 842 F.2d 515, 527 (1st Cir. 1988). In *United States* v. *Goodrich*, 871 F.2d 1011 (11th Cir. 1989), for example, the Eleventh Circuit correctly held the line in the face of a similar effort to skirt it. In that case, involving county commissioners who were bribed to get favorable zoning decisions, the intervening *McNally* decision led the government to swap out its previously charged honest services fraud theory for a new property-fraud theory, claiming—as here—that the defendant had deprived the county of the salaries and services of the commissioners who participated in "sham commission meetings" where the result was "foreordained," and—as here—had also deprived the county of "control over the decision making process" concerning zoning (*i.e.*, the right to control public money or property). *Id.* at 1012-13 & n.1. But the Eleventh Circuit held that the district court properly dismissed the money-and-property fraud charges because the use of public employee labor for commission meetings that were supposedly a charade was "indistinguishable from the intangible right to good government described in *McNally*," and the "right" to "have control over zoning decisions … cannot be considered property." *Id.* at 1013-14, 1015. In short, the court of appeals held that the government may not charge "a scheme to defraud a victim of money and

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of any property involved; here, supposedly, the bridge, the tollbooths, the lanes, etc. *Id.* Only the most unimaginative federal prosecutor could ever be stymied.

property" when it actually is pursuing "a scheme to defraud the [public] of [its] right to good government." *Id.* at 1013.

The Seventh Circuit has likewise repeatedly rejected the notion that the mere involvement of some public money or property makes it federal fraud when a public official proffers one reason for an official decision while secretly harboring a different, political reason. As that court explained in reversing mail and federal program fraud convictions in *United States* v. *Thompson*, 484 F.3d 877 (7th Cir. 2007), "The idea that it is a federal crime for any official in state or local government to take account of political considerations when deciding how to spend public money is preposterous." *Id.* at 883. Again, in *United States* v. *Blagojevich*, 794 F.3d 729 (7th Cir. 2015), the Seventh Circuit reiterated that the law does not impose "an extreme version of truth in politics, in which a politician commits a felony unless the ostensible reason for an official act also is the real one." *Id.* at 735-36.

The court of appeals swept the reasoning of these decisions away by saying that, unlike the garden variety instance of an official making a decision that uses public resources while dissembling to conceal his or her political motivation, here there was no "facially legitimate justification" for what Baroni used Port Authority money and property to do. Pet. App. 36a. Not so. Using Port Authority resources to renovate or do work on a private residence would, as an example, be a facially illegitimate use of Port Authority money or property. See, *e.g.*, *United States* v. *Pabey*, 664 F.3d 1084, 1089 (7th Cir. 2011); *United States* v. *Baldridge*, 559 F.3d 1126, 1139 (10th Cir. 2009). But there was nothing facially illegitimate about using Port Authority resources to study traffic. Indeed, the Port Authority had

another traffic study going the same week. Pet. App. 15a.

Likewise, there was nothing facially illegitimate about using Port Authority resources to reallocate Fort Lee's allotment of special access lanes. Resources were used to allocate the special access lanes decades earlier, and could presumably be used to supplement or reduce them at some point in the future. Fort Lee had no legal claim to the allocation of three special access lanes. Indeed, given that Fort Lee had a population of less than 40,000 and the rest of Northern New Jersey a population of at least 3.5 million, it would have been more apt for the court of appeals to describe as facially illegitimate the informal historical (and political) arrangement under which Fort Lee's 1.1% of the regional population was allocated 25% of the access lanes. See U.S. Census Bureau, *City and Town Population Totals: 2010-2018* (June 27, 2019) (data for Fort Lee); U.S. Census Bureau, *County Population Totals and Components Change: 2010-2018* (June 27, 2019) (data for New Jersey counties).

In sum, the basis for the convictions in this case is not that the Port Authority's resources were put to facially illegitimate use, but that they were put to facially legitimate use by an official who offered a reason that concealed his real, political reason. An official in that circumstance has committed no fraud and effected no deprivation of money or property. To allow such a conviction to stand would wash the limitations of *McNally* and *Skilling* away and put the federal government right back in the business of "setting standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360.

4. Even the government now seems to side with the circuits that have recognized that merely invoking

"money or property" does not have the talismanic effect of circumventing the well-established rule that it is not fraud for a public official to proffer an insincerely held justification for an official act as pretext for the real political reason. In its brief in opposition to Kelly's petition for a writ of certiorari, the government conceded that, "An official who allows political motives to influence a decision she unilaterally possesses the authority to make does not commit fraud, even if she conceals her true motives." Brief for the United States in Opposition at 15 ("BIO"). The government grounded that acknowledgement in the requirement that a fraudulent statement must be material, presumably reasoning that an official who has the authority to direct an action and yet lies about it has not told a material lie because the official has the power to direct the action anyway. *Id.* (quoting *Neder* v. *United States*, 527 U.S. 1, 16 (1999)).

But the government contends that that only applies to "officials who possess unilateral authority" to make the decision in question, and Baroni, it claims, did not have such unilateral authority here. BIO at 15. That argument does not withstand scrutiny.

If the government means "unilateral authority" to refer to whether Baroni generally had the authority to order lane realignments and traffic studies in the first place, the record shows he did, and the government has seemingly never contended otherwise. Indeed, the government's opening statement to the jury asserted that Baroni "had the power to operate the George Washington Bridge," J.A. 68, and its summation trumpeted that Baroni "had influence[,] … had authority[,] … had the power to turn the wheels of Government … with [a] simple phone call, a text, an email," including "mov[ing] the cones." *Id.* at 885. Various of the government's witnesses similarly confirmed the

breadth of Baroni's authority. *Id.* at 236, 519. Indeed, as to lane realignments specifically, Executive Director Foye testified that no "policy [had] ever [been] proposed or put in place at the Port Authority" to require the Deputy Executive Director to get the Executive Director's approval in order to make a "permanent change … of a lane configuration." *Id.* at 194-95. The record is devoid of *anything* that suggests Baroni lacked the general authority to initiate a lane realignment or a traffic study.

More likely, what the government means when it says that Baroni lacked unilateral authority is that he lacked what the Third Circuit called "unencumbered authority," because he was subject to having his authority "countermanded" by Foye. Pet. App. 18a. While it is true that Baroni was subject to being countermanded by a superior authority—almost every public official is subject to that possibility—that has no bearing on the analysis. This Court made clear in *McNally* and *Skilling* that a public official does not commit fraud when he or she acts with a concealed political motive. The government agreed in *Weyhrauch*, and then again in its opposition to Kelly's petition here. Having established the principle, it cannot be that the only public officials protected by it are ones who have no countermanding authority above them. Short of (perhaps) chief executives like the President of the United States and the 50 state governors, almost all public officials operate below someone in a position of superior authority who could countermand their decisions. It would be cold comfort if the government's acknowledgement that it does not seek to prosecute "[a]n official who allows political motives to influence a decision she unilaterally possesses the authority to make … even if she conceals her true motives," BIO at

15, is meant to reassure only the handful of state, local, and federal officials who do not have any boss, while all other public officials—cabinet secretaries, department heads, lieutenant governors—act at their peril if they conceal their political motivations for decisions otherwise within their direct authority.[7]

Indeed, it is not simply public officials with someone above them who should see the ominous messaging in the government's position. Members of multi-member decisionmaking bodies like Congress, state legislatures, city councils, and county commissions should also see the charging language on the wall. Under the government's theory, a public official only gets a pass on asserting a neutral and insincerely held justification that conceals her real political motive for an official action where the action is hers to control, because, in the government's thinking, in that situation she "do[es] not need to lie" and the lie is immaterial; it did not "cause a deprivation of money or property." BIO at 15. But what about a legislator who convinces other legislators to vote for an appropriation—or, perhaps more analogous to this case, discontinue one—on some proffered ground that is a pretext for the legislator's actual desire to favor some political constituency or settle a score with a different one? That legislator told a lie that the government views as material.

Thus, there is no merit to the government's worry-thou-not claim that its theory of property fraud will not do under a different name exactly what the gov-

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[7] Notably, when Baroni was confronted by Foye concerning the possibility of having his order countermanded on the last day of the realignment, Baroni was candid, telling Foye that the reason for the realignment was that it was "important to Trenton," which Foye understood to mean that it was important to Governor Christie's office. Pet. App. 10a.

ernment has been prohibited from doing (indeed, foreswore doing) under honest services fraud. The government promises only that it will not be able to use money-or-property fraud to target the handful of highest level public officials who have "unilateral authority" over an official decision because they are imbued with such awesome power by virtue of their position—power virtually unknown in a democratic system—that they are legally incapable of telling a material lie that would cause the deprivation of money or property. But for everyone else—thousands upon thousands of local, state, and federal officials in the executive and legislative branches who are inherently subject to having *someone* second-guess or countermand their otherwise authorized decision—any false statement about the basis for their decision that conceals a political motive and causes the use of public money or property is chargeable.

The government's answer is not the right one. The federal fraud statutes have never been read to cover what the government suggests; they have been read to exclude what the government suggests. That is because while it may be deceit when a public official—probably all public officials, in practice—offers a false, sanitized explanation for an official action while secretly harboring a political purpose, it has never been considered fraud. And while the official invariably causes public money or property to be used in making or executing the decision, he does not thereby obtain it or deprive his agency of it. The government's attempt to craft a code of good government for state and local officials from the federal property fraud statutes should be rejected and the convictions in this case reversed.

II. CORE CONSTITUTIONAL PRINCIPLES REQUIRE THE GOVERNMENT'S INTERPRETATION OF THE FEDERAL FRAUD STATUTES TO BE REJECTED.

"Wherever possible, statutes must be interpreted in accordance with constitutional principles." *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 108 (1946). That is particularly so in the area of purported official corruption, where this Court has made clear that "a statute … that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *McDonnell*, 136 S. Ct. at 2373.

Here, the government's interpretation of the federal fraud statutes stands not just to turn those statutes into a meat axe, but one with an exceptionally long handle. Using ordinary property fraud statutes that from their text offer *no* apparent prohibition on operating government agencies with concealed political interests—the very point of *McNally*—the government would find a tool that can be used to reach every executive and legislative branch official of every state and locality in the country (save for those with "unencumbered authority"), falling on whomever the federal authorities conclude has dispensed, withheld, or revoked a public resource for a concealed political purpose in a way that those federal authorities perceive as illegitimate.

The hypothetical existence of such laws would present a sorry and untenable state of affairs. But regardless, those are not the laws we have. Indeed, to conclude otherwise—and to sustain a conviction along those lines in this case—the government would need to contravene an entire set of constitutional canons of construction that demand a narrow rendering of the federal fraud statutes, including that: (1) due process demands fair notice before imprisoning public officials

for supposed wrongs, and strong limitations on arbitrary and discriminatory enforcement of criminal statutes; (2) ambiguous criminal statutes should be interpreted in favor of lenity; (3) core federalism principles demand that the federal government not impose "good government" ethics codes on state and local public officials through federal criminal law; and (4) those officials should not be deterred from public service because of an ever-present threat of arbitrary prosecution.

1. "In our constitutional order, a vague law is no law at all." *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019). Vague laws violate "the twin constitutional pillars of due process and separation of powers." *Id.* at 2325. As to the former, due process requires that criminal statutes "give ordinary people fair warning about what the law demands of them." *Id.* at 2323; see also *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."). As to the latter, vague laws are incompatible with the separation of powers because they "threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges," *Davis*, 139 S. Ct. at 2325, instead of reserving that power to "the people's elected representatives in Congress," *id.* at 2323.

To conform to these constitutional requirements, a penal statute has to define a criminal offense both "with sufficient definiteness that ordinary people can understand what conduct is prohibited," and "in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 561 U.S. at 402-03. The government's interpretation of the federal fraud statutes here fails both requirements.

As to definiteness, it is impossible to know where the government—much less an ordinary person—would find the line between acceptable politically motivated acts and unacceptable ones. Just as when the government briefly trod this same ground in the honest services fraud context, the fatal flaw is that the government's use of the federal property fraud statutes to prosecute such conduct lacks any "coherent limiting principle." *Sorich*, 555 U.S. at 1206 (Scalia, J., dissenting from denial of cert.).

For example, the government seems to be prepared to tolerate almost any amount of concealed political favoritism. In this case alone, the government offered evidence of numerous uncharged acts of political favoritism involving public resources. Fort Lee itself was favored with "Port Authority Police assistance directing traffic in Fort Lee, a $5,000 contribution to the Fort Lee fire department for an equipment purchase, and over $300,000 in funding for four shuttle buses providing Fort Lee residents with free transport between ferry and bus terminals." Pet. App. 5a-6a. Other New Jersey localities might well have had a greater need for those public funds, but they went to Fort Lee for political reasons. Would concealing that fact be money or property fraud? It is unclear under the government's theory why it would not be.

Perhaps those actions purportedly fall on the noncriminal side of the line because those funds were spent on something that someone—maybe prosecutors, maybe a court—has concluded had a "facially legitimate justification." Pet. App. 36a. But what if they were not? Suppose that the $300,000 in funding for shuttle busses had established a service that "made no economic or practical sense," as the court of appeals said of the lane realignment. *Id.* at 28a. Or suppose that in a mirror image of what the government claims

happened here, Baroni had ordered a traffic study for the pretextual purpose of giving Fort Lee two almost entirely unnecessary extra special access lanes, in a way that pleased Mayor Sokolich and encouraged his endorsement, but cost every Main Line driver ten extra minutes of traffic. The overall utilitarian benefit of doing that might be exceptionally doubtful—although Fort Lee drivers would at least see *some* benefit, just like Main Line drivers saw a measurable benefit from the decrease in their own traffic during the week of the lane realignment—but if that is the standard for criminality, an ordinary person could never find that critical marker in the text of the property fraud statutes at issue here.

Most likely, where the government would draw the line is political punishment, since that was the theme that it featured most prominently in the indictment. *E.g.*, J.A. 25 ("The object of the conspiracy was to misuse Port Authority property to facilitate and conceal the causing of traffic problems in Fort Lee as punishment of Mayor Sokolich."). But the notion that it is federal property fraud for a public official to deny a resource to another official or that official's constituents as political payback while proffering a neutral, pretextual reason is not consistent with the reality of everyday political life. See Bernadette Hogan, *Rep. Reed Calls for DOJ Investigation Into Cuomo Over Crumbling Interstate*, N.Y. Post (Aug. 28, 2019) (reporting allegation that governor of New York refused to repair a stretch of highway in order exact political revenge against a local Indian tribe); Liam Moriarty, *Gov. Kate Brown To Veto Funding For Medford Projects As Political Payback*, Jefferson Pub. Radio (Aug. 8, 2017) (reporting allegation that Oregon governor vetoed millions of dollars in funding for three projects in district of legislator who reneged after promising to support

governor's tax bill); Erica Martinson, *Trump Administration Threatens Retribution Against Alaska Over Murkowski Health Votes*, Alaska Dispatch News (Jul. 26, 2017) (reporting allegation that U.S. Interior Secretary threatened to withhold federal support for Alaska after senator from Alaska broke party ranks and voted against repeal of the Affordable Care Act).

Even the record in this case shows that any supposed prohibition on acting with concealed punitive political interests is murky at best. As discussed above, trial evidence showed that the Christie administration withdrew plans to dole out "Mayor's Day" benefits to Mayor Fulop of Jersey City, and then resolved to have the various branches of state government and the Port Authority ignore him entirely, as political payback for Mayor Fulop's refusal to endorse Governor Christie. Pet. App. 45a. In moving to admit evidence of that episode at trial, the government described it as bearing a "striking" "degree of factual similarity" to the charged conduct while maintaining that the episode "was not criminal." J.A. 62-64. In a country whose criminal laws are supposed to be knowable by ordinary people, it must be a truism that if two sets of facts are "striking[ly]" "similar[]," the same legal outcome should flow from both—so if the first of those is conceded to be "not criminal," and the facts in this case strike even the government itself as closely "similar[]," then the government's concession should reach this case too. But more broadly, the government's concession that it is not criminal to employ the public time and labor of various state and Port Authority executives and employees, along with any public property they used (such as phones and computers), to perpetuate the concealed political aim of freezing out a disfavored local mayor shows that it is impossible for the

government to come up with a theory of criminal liability here that draws a defensible line between what is permitted and what is fraud.

Ultimately, the problem with the government's theory in this case is not that it is inconceivable that any of the foregoing examples or the defendants' own conduct in this case could be criminalized. It is that "it's *impossible* to say that Congress surely intended that result." *Davis*, 129 S. Ct. at 2333 (emphasis in original). The federal property fraud statutes do not facially cover any of the conduct, and even if they did, they certainly offer nothing that would allow an ordinary public official to discern which of these options they prohibit. Instead, "All these options and more are on the table. But these are options that belong to Congress to consider; no matter how tempting, this Court is not in the business of writing new statutes to right every social wrong it may perceive." *Id.* at 2336.

2. The definiteness problem is only compounded by the honest services fraud cases discussed in the preceding section, because an ordinary person is on notice of the culling of the fraud statutes that this Court worked in those cases. Put differently, the defendants were entitled to take a measure of comfort from the fact that the Court pared "honest services" back to "bribery and kickback schemes," *Skilling*, 561 U.S. at 412, while informing the world that "the taking of official action by the employee that furthers his own undisclosed … interests while purporting to act in the interests of those to whom he owes a fiduciary duty" is *not* federal fraud. *Id.* at 409. Thus, especially after *Skilling*, the defendants were permitted to expect that the government could not prosecute them for what would previously have been honest services fraud, absent some amendment to the statute.

3. The lack of definiteness leads to the second concern with vague statutes—that they "encourage arbitrary and discriminatory enforcement." *Id.* at 402-03. Under the government's reading of the fraud statutes—that a public official defrauds the government of its property by advancing a reason for an official decision that is a pretext for a political motive—a significant portion of everyday state and local political activity will become criminal; far more than would or could ever be prosecuted. Statehouses and city halls will become smorgasbords for federal prosecutors, who will be left to their own personal instincts and biases to decide when a public official has indulged too great a concealed political motive. This Court's vagueness cases forbid a statute that affords such "a standardless sweep" that it "allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). If the government's theory of fraud were correct, the fraud statutes would do exactly that.

4. Closely related to these due process concerns "is the familiar principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling*, 561 U.S. at 410-11 (internal quotation marks omitted). Like other due process principles, the rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). It also upholds the principle that, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). Accordingly, this "Court has often stated that when there are two rational readings of a criminal statute, one harsher

than the other, [it is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60 (collecting cases); see also *Davis*, 139 S. Ct. at 2333 (the rule of lenity "teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor").

Describing as fraud the commonplace masking of a political purpose behind a contrived policy rationale, and thus permitting Baroni and Kelly's convictions under the federal fraud statutes, "turns the rule of lenity upside down." *United States* v. *Santos*, 553 U.S. 507, 519 (2008) (plurality opinion). It resolves ambiguity in favor of criminality rather than lenity by construing those statutes to apply to the novel context of public officials reallocating a public resource from one constituency to another for an undisclosed political reason. That decision makes mincemeat of the cardinal principle to "interpret ambiguous criminal statutes in favor of defendants, not prosecutors." *Id.*

5. Core principles of federalism also strongly favor a narrow reading of the federal fraud statutes. The Court recently reaffirmed that it will not "'construe [a criminal] statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials,'" and will instead impose "a more limited interpretation" when such an interpretation is supported by both text and precedent. *McDonnell*, 136 S. Ct. at 2373 (quoting *McNally*, 483 U.S. at 360). And "[p]erhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond* v. *United States*, 572 U.S. 844, 858 (2014).

The conduct at issue in this case was embedded in local politics: New Jersey state political operatives purportedly punished a New Jersey municipality's

mayor by moving around the traffic cones on a New Jersey highway to reallocate lane access from one New Jersey constituency to another. Imposing federal criminal punishment on those operatives entangles the federal government in deciding what are and are not "good government" norms for local and state officials—a decision that should be left to state and local actors.

Moreover, the actual functioning of the state and local democratic processes in this case—which worked predictably to remedy the political folly—provides an object lesson in why it is correct to leave the setting of standards for good government to the states unless Congress speaks more clearly than it has here. Put differently, one should not lightly infer that Congress intended a federal criminal solution to problems like this because the result here shows that problems like this do not need one. Nobody got away with anything in this case. The defendants were fired due to the public outcry about their purported actions, and Governor Christie saw his popularity plummet, his presidential ambitions destroyed, and his political career finished.

That swift and harsh political judgment rendered by the people of New Jersey was the appropriate response to Bridgegate. Voters were permitted to weigh the good with the bad and ultimately passed judgment on these state officials. Likewise, to the extent state laws were violated, charges could have been brought had state and local officials believed that necessary. With those functioning, politically accountable state processes in place, principles of federalism do not and should not permit unelected federal prosecutors to use broad property fraud statutes to inject themselves after the fact for the purpose of imposing their own view of good government on New Jersey. That is intolerable in our federalist system.

6. Finally, special restraint is warranted when contemplating the interpretation of a statute to be brandished against public officials. In particular, there are "significant constitutional concerns" whenever a criminal statute is rendered so as to "cast a pall of potential prosecution" over "nearly anything a public official does." *McDonnell*, 136 S. Ct. at 2372. But that is exactly what will happen if these convictions are upheld. Public officials will be left to wonder whether they will be prosecuted for a federal crime every time they reallocate traffic lanes from Constituency A to Constituency B; every time they decide to allocate five school buses to School A for the coming school year but allocate six school buses to School B; and every time they hire Citizen A's daughter for a summer internship instead of Citizen B's daughter. So long as there is a concealed political motive and a public employee whose labor is diverted, there is a federal crime. Allowing that pall of prosecution to endure will chill the activity of public-spirited, politically neutral public officials and will deter qualified persons from seeking to serve in public roles. Perversely, prosecutorial campaigns like this one seeking to enforce good government norms will make good government that much harder to attain.

III. THE GOVERNMENT'S THEORY OF FRAUD CRIMINALIZES A WIDE RANGE OF ORDINARY POLITICAL ACTIVITY.

The government's theory of fraud in this case should also be rejected because, if it becomes the law of the land, it will criminalize ordinary political practices. It has no limiting principle. Under the government's theory, a public official who orders some official action and lies to subordinates about the political motivations behind that action is a felon.

Here, the putative crime was offering a cover story for taking resources away to punish a political opponent while giving a different reason. In the next case, the FBI will pursue a governor who directs his staff to draw up a proposal for a new state office building. If the governor tells his staff that the government needs more space, and that the pitch to the legislature should say so, but the real reason for the project is to curry favor by generating construction jobs in an important district, then the governor has committed federal fraud. Or a federal prosecutor might instead indict and try a county supervisor for making an appointment to the zoning board. If that county official has told her deputy that this is the person best qualified and asked him to prepare a memorandum saying so, but the real reason for the appointment is that the appointee is supported by local developers who stand behind the county official, then the county supervisor is subject to federal imprisonment at the whim of the local U.S. Attorney.

Some may find politically motivated decisions like these to be unappealing aspects of local politics, but no one would deny that they *are* aspects of local politics. And they have never before been deemed criminal. If the Court endorses the government's theory, any public official who is *not* indicted when he or she engages in such activity will have to thank the grace of prosecutorial discretion. But that is not good enough. Public officials should not have "to rely on the Government's discretion to protect against overzealous prosecutions." *McDonnell*, 136 S. Ct. at 2373 (internal quotation marks omitted).

A trio of cases from this Court's recent docket illustrate the problem that the government's theory here would create. As this Court acknowledged in *Department of Commerce* v. *New York*, even federal agency

policymaking is "not a 'rarified technocratic process, unaffected by political considerations.'" 139 S. Ct. at 2573. In that case, the plaintiff challenged whether an agency's decision was based on its stated policy rationale or whether that was a pretext to hide a purely political motive. This Court concluded, on the "materials before" it, that "unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the [agency] enforcement rationale—the sole stated reason—seems to have been contrived." *Id.* at 2575. On the government's theory in *this* case, pursuing what is in truth a politically motivated nationwide policy, involving the expenditure of substantial federal funds, on the basis of a "contrived" reason would constitute fraud and be grounds for imprisonment. But the Court's decision there suggests only that a trial court must, on a sufficiently compelling record, test the reasons behind a federal policy; to the defendants' knowledge there has been no suggestion that the officials whose actions were at issue in that case committed fraud, nor has there been any effort to pursue charges against them. If the smoke-screened policy decision in the census case is not a federal crime, then neither is Baroni's.

The same may be said for *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2419 (2018). There, the executive branch articulated a valid reason for a policy of excluding certain aliens from the United States. Unofficial statements by the President suggested that the officially proffered reason for the policy was a pretext and that the real reason was to mollify political supporters of an exclusionary policy. This Court, however, reaffirmed its long-standing rule that it will not look behind the proffered reason for a policy of alien exclusion so long as it is "facially" legitimate and bona fide. *Id.* A policy supported by such a facially legitimate justification will

instead be affirmed as the law of the land. The Court could hardly have so held if the evidence of pretext before it tended to show that those who enacted the policy had committed federal fraud. But the government's theory in *this* case, if it were the law, would mean that the policy in that case would have been both *ultra vires* and criminal. The officials involved in that case have not been indicted, however, because what they did there was, in fact, not criminal fraud.

Finally, in *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019), the Court reiterated its observation that "the original unanswerable question"—the foundation of the political question doctrine—is, "How much political motivation and effect is too much?" *Id.* at 2505. And it held that while "[e]xcessive partisanship"—in that case, in redistricting—might "reasonably seem unjust," the "solution" does not lie "with the federal judiciary." *Id.* at 2506. Those words could have been written for this case. The public had every reason and every right to have been angered by the traffic on the George Washington Bridge. To have been outraged when it turned out to have been political animus and not public-minded policymaking that cost them hours out of their days for a week. To have demanded that those who did it be fired from their positions of public trust. And to have replaced the (now abysmally unpopular) outgoing governor with the opposite party's candidate. The "solution" to the "excessive partisanship" on display in the State of New Jersey that week thus lay not "with the federal judiciary" but in those exercises of the civic powers reserved to the people of that state.

The ink is thus hardly dry on a set of cases in which both the government's position and this Court's decision recognized that policy and politics are inextricable. And even a sample of recent news reports such as

those cited above (see *supra* § II.1) shows the same thing over and over again: officials taking official actions for undisclosed political reasons. As a raft of recent cases and stories thus illustrates, if this Court turns political knife-fighting into a federal felony, the halls of state and federal government will present prosecutors with a target-rich environment.

Worse yet, in today's political climate, the true test for when prosecutions are brought under the government's expansive interpretation may not be when the actions seem to the prosecutor to be excessively political, but when the *actors* seem to the prosecutor to have the *wrong* politics. In recent years, it has become commonplace to call for and pursue criminal investigations of one's political adversaries. The actively encouraged chant of "Lock Her Up" was a central feature of the 2016 presidential campaign, and has continued unabated since then. Summer Meza, *Trump Rallygoers Now Chant 'Lock Her Up' About Any Woman They Don't Like*, The Week (Oct. 10, 2018). Similarly, one does not need to spend much time searching the archives of our national media to find further calls from both ends of the political spectrum to investigate and prosecute political adversaries. See, *e.g.*, Nicholas Fandos, *House Democrats Are Flooding Trump World With Demands. Here's a Guide to the Investigations*, N.Y. Times (Mar. 7, 2019); Nicholas Fandos, *House Democrats Demand Information From White House About Security Clearances*, N.Y. Times (Mar. 1, 2019); Rebecca Ballhaus & Corinne Ramey, *Trump Foundation Says New York State Probe Is Rooted in Political Bias*, Wall St. J. (Aug. 30, 2018); Michael Schmidt & Maggie Haberman, *Justice Dept. to Weigh Inquiry Into Clinton Foundation*, N.Y. Times (Nov. 13, 2017).

If the federal fraud statutes are implicated whenever public officials conceal their political motives for public

acts, political opponents (and politically minded prosecutors) will have ample opportunity and motivation to test out this new theory of fraud. Indeed, this very case is arguably illustrative of that tendency. Former-Governor Christie has publicly alleged that political motivations played a role in the initiation of the investigation into Bridgegate and the timing of the charges and trial. See Ryan Hutchins, *Chris Christie: Bridgegate Prosecutor Wanted to Score Points With Clinton*, Politico (Jan. 29, 2019).

Ultimately, the government's interpretation cannot be the law. The heated rhetoric of recent years notwithstanding, one of this Nation's deepest, most strongly held commitments is that political disputes should be resolved through political channels and the ballot box, not indictments and prison cells. This Court should reaffirm that commitment and reverse the defendants' convictions.

CONCLUSION

The Court should reverse the judgment of the court of appeals below.

Respectfully submitted,

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